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SUPREME COURT, U.S.

No. 99-1268

IN THE

Supreme Court of the United States

KENNECOTT UTAH COPPER CORPORATION,

Petitioner,

v.

GEORGE BECKER; WAYNE HOLLAND, JR.; TOM PERFILI; SUBDISTRICT 5 UNITED STEELWORKERS OF AMERICA; LOCAL 392 UNITED STEELWORKERS OF AMERICA and UNITED STEELWORKERS OF AMERICA, AFL-CIO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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Petitioner Kennecott Utah Copper Corporation ("Kennecott") submits this Reply in support of its Petition for a Writ of Certiorari. Kennecott has identified two splits among the Circuit Courts concerning the public policy exception to the enforcement of arbitration awards.[1] The Circuit Courts are divided over: (a) the existence of a public policy that encourages employers to eliminate employee drug use in safety sensitive positions by creating and enforcing drug-free workplace policies; and (b) the relevance of public policies that do not expressly forbid the arbitrator's stated remedy. (Pet. at 9-17.) The Tenth Circuit in its decision below sided with the Second and Ninth Circuits, and expressly rejected the positions of the First, Third, Fifth, Eighth and Eleventh Circuits on these issues.

The Tenth Circuit's ruling that the Arbitration Award drew its essence from the collective bargaining agreement ("CBA") conflicts with relevant decisions of this Court. The Arbitrator ignored the plain meaning of the CBA, exceeded his authority under the CBA, and imposed his own brand of industrial justice. (Pet. at 17-25.)

Respondents Becker, Holland, Perfili, and Subdistrict 5 and Local 392 of the United Steelworkers of America (collectively "Respondents") have filed a Brief in Opposition ("Opp.") to Kennecott's Petition. Respondents attempt to distinguish the present case from other public policy cases. In so doing, Respondents only cloud the differences among the Circuit Courts. The differences themselves remain, and this Court should grant the Petition to unify national labor policy on these issues.

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1. Courts must refuse to enforce arbitration awards that contravene public policy. *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 42 (1987).

FURTHER REASONS FOR GRANTING THE WRIT

I.

THE ISSUES PRESENTED HERE CONCERNING DRUG USE IN SAFETY SENSITIVE POSITIONS COMPLEMENT THE ISSUES PRESENTED IN *EASTERN ASSOCIATED COAL.*

This Court has recently granted a writ of certiorari in *Eastern Associated Coal Corp. v. United Mine Workers of America, Dist. 17*, 68 U.S.L.W. 3585 (U.S. March 21, 2000) (No. 99-1038). In *Eastern Associated*, as here, the grievant was reinstated into a position driving a heavy-duty truck despite testing positive for drug use.[2] In *Eastern Associated*, as here, the Court of Appeals enforced the arbitration award because reinstatement was not illegal. The only difference between *Eastern Associated* and the present case is that, while *Eastern Associated* principally relies on Department of Transportation regulations as the source of public policy, Kennecott principally relies on a state statute specifically authorizing employers to create and enforce drug-free workplace policies. Deciding the present case in conjunction with *Eastern Associated* would resolve the issues relating to the enforcement of drug-free workplace policies both for employers operating under federal regulatory drug testing and for employers implementing state statutory drug policy.

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2. Contrary to Respondents' assertion (Opp. at 3-4), both the instant case and *Eastern Associated* involve reinstatement to a safety sensitive position. *See* Part II A., *infra*.

II.

THE CIRCUIT COURTS DISAGREE WHETHER PUBLIC POLICY FORBIDS DRUG USE BY EMPLOYEES IN POSITIONS THAT THREATEN THE SAFETY OF THE EMPLOYEES THEMSELVES, CO-WORKERS AND THE PUBLIC.

Respondents acknowledge that the Circuit Courts are divided over the application of the public policy exception where employees test positive for drug use. (Opp. at 4.) Respondents mistakenly argue, however, that this split is solely related to concerns for *public* safety, as opposed to workplace safety. (*Id.*)

A. The Grievant Occupied A Safety Sensitive Position.

Respondents assert that the finders of fact in this case did not find that the grievant occupied a safety sensitive position. (Opp. at 2.) The grievant was driving a fully loaded ten-wheel dump truck when it turned over. (*See* App. 3a, 17a, 27a.) The need for safe operation of such a vehicle is paramount. Evidently, Respondents' meaning is that the grievant posed no risk *to the public* because he operated the dump truck on Kennecott's property. (Opp. at 2 n.1.) The Arbitrator understood that the grievant's proscribed conduct posed risks to himself and to co-workers. (*See* App. 30a [Kennecott's interest in preventing drug use was "a vital concern . . . not only to the Company, but to every employee who must work near dangerous equipment which is operated by fellow employees"].)

B. The Circuit Courts Have Not Distinguished Between Public Safety And Workplace Safety.

Respondents assert that all the Circuit Courts that have blocked enforcement of arbitration awards for reasons related to the employees' drug use have been concerned with *public* safety. (Opp. at 4.) Contrary to Respondents' position, many of the cases blocking enforcement of arbitration awards involve risks only to the employee him- or herself and to co-workers, or involve risks to both employees and the public. *See, e.g., Exxon Corp. v. Baton Rouge Oil*, 77 F.3d 850, 856 (5th Cir. 1996) (employee supervised olefin purification and posed risk to "his company and to fellow employees"); *Union Pacific R. Co. v. UTU*, 3 F.3d 255, 256, 262 (8th Cir. 1993) (reinstatement of railyard brakeman conflicted with public policy protecting employees themselves, co-workers and the public); *Delta Airlines, Inc. v. ALPA*, 861 F.2d 665 (11th Cir. 1988) (reinstatement of airline pilot conflicted with public policy protecting passengers and crew).[3]

Moreover, the decisions of other Circuit Courts *enforcing* arbitration awards despite employees' positive

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3. Other "safety sensitive positions" affect other public interests, including the environment. *See, e.g., Exxon Shipping Co. v. Exxon Seaman's Union*, 11 F.3d 1189, 1190, 1196 (3d Cir. 1993) and other *Exxon* cases cited in the Petition, applying public policies that protect "safe operation of the ship" even when at anchor, and prevent loss of life, environmental damage and economic injury. The Federal Mine Safety and Health Review Commission has also recognized that drug-free workplace policies serve public interests in safety, health and productivity. *Sec. on behalf of Price and Vacha v. Jim Walter Resources, Inc.*, 12 F.M.S.H.R.C. 1521, 1531-32 (1990).

drug tests have involved threats to *public* safety. *See, e.g., Int'l Bhd. of Elec. Workers, Local 97 v. Niagara Mohawk Power Corp.*, 143 F.3d 704, 707 (2d Cir. 1998) (employee responsible for effluents from nuclear facility); *United Food and Commercial Workers Int'l Union, Local 588 v. Foster Poultry Farms*, 74 F.3d 169, 171 (9th Cir. 1995) (commercial vehicle operators); *Stead Motors v. Automotive Machinists Lodge No. 1173*, 886 F.2d 1200, 1202 (9th Cir. 1989) (mechanic who repeatedly failed to tighten lug nuts on customer automobiles). Respondents' classification of the cases according to the Circuit Courts' concern for *public* safety is illusory. All these Circuit Courts have been concerned with the application of public policies concerning drug use to "jobs that pose a threat to the safety *of the other workers and/or the general public*." *Baton Rouge Oil*, 77 F.3d at 854 (emphasis added).

C. The Circuit Courts Are Split Over The Relevance of Public Policies That Do Not Expressly Forbid Reinstatement.

In a second attempt to distinguish this case from other public policy cases blocking enforcement of arbitration awards for reasons related to drug use, Respondents contend that the public policies cited in the other cases were "far more pointed" than the Utah statute and federal precedent on which Kennecott relies. (Opp. at 6.) According to the parenthetical descriptions of the cases cited in their brief, Respondents mean that the expressions of public policy on which those other cases rely were statutes and regulations imposing *duties* on employers or employees. (*See id.* at 6 n.4.) In contrast, Respondents argue, the Utah statute merely *permits* employers to conduct drug tests and does not forbid reinstatement. (*Id.* at 2, 6.)

Respondents' position ignores the second split among the Circuit Courts. The Second, Ninth and Tenth Circuits have held that the public policy exception applies only when the public policy expressly *forbids* the relief granted in the award. (Pet. at 14.) The First, Third, Fifth, Eighth and Eleventh Circuits all have a more flexible view, applying the public policy exception whenever the contract as interpreted in the award undermines the public policy goal of preventing drug use in safety sensitive positions. (Pet. at 15.) *See, e.g., Exxon Shipping Co. v. Exxon Shipping Union*, 73 F.3d 1287, 1294-95 (3d Cir. 1996) (though regulations do not mandate discharge, reinstatement would undercut public policy). The more flexible approach, which the Tenth Circuit rejected, would bar enforcement of the Award at issue here, especially in light of Congress' determination that mine operators

> have the final responsibilities for affording safe and healthful workplaces for miners, and therefore, have the responsibility for developing and enforcing through appropriate disciplinary measures, effective safety programs that could prevent employees from engaging in unsafe and unhealthful activity.

Western Fuels - Utah, Inc. v. Sec. of Labor, 10 F.M.S.H.R.C. 256, 261 (1988) (quoting S. Rep. No. 95-181 at 18 (1977)). *See also* 30 C.F.R. § 57.20001 (1999) ("[p]ersons under the influence of alcohol or narcotics shall not be permitted on the job").

Respondents have merely endorsed one side in the split among the Circuit Courts. This is not a basis for denying the Petition.

D. By Addressing The Splits Among The Circuit Courts, This Court Would Redress Petitioner's Injuries.

Finally, Respondents contend that the Tenth Circuit "did not reject the expanded public policy relied upon by the First Circuit in *Exxon Corp.*" but merely "question[ed]" whether the policy could be "squared" with Supreme Court precedent. (Opp. at 7.) The Tenth Circuit not only questioned, but also rejected the rulings of the First, Third, Fifth, Eighth and Eleventh Circuit Courts on the ground that the rulings did not identify a public policy violated by the grievant's reinstatement. (App. 9a-10a.) The Tenth Circuit reached this conclusion in reliance upon the rulings of the Second and Ninth Circuits that the only relevant public policies would be those that make reinstatement illegal. (App. 9a.) Therefore, by resolving the two splits among the Circuit Courts, this Court would directly redress the Tenth Circuit's erroneous rulings below.

III.

THE TENTH CIRCUIT'S DECISION CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT IN HOLDING THAT THE AWARD DRAWS ITS ESSENCE FROM THE COLLECTIVE BARGAINING AGREEMENT.

Respondents have provided no compelling response to Kennecott's arguments that the Tenth Circuit failed to follow relevant rulings of this Court. Respondents assert that the arbitrator interpreted the CBA and the Memorandum of Understanding ("MOU"). (Opp. at 8.) They provide no record citation for this interpretation. In fact, the Arbitrator's crucial decisions concerning the application of the bargained drug-free workplace policy were not interpretations of the

CBA and MOU. (*See* Pet. at 18-21.) The Arbitrator interpreted the MOU only by noting that: (a) Kennecott and the Union agreed to the terms of the MOU (App. 29a); (b) the MOU prohibits "[w]orking . . . while not being free from the presence of drugs" (*id.* 25a); (c) compliance with the MOU is "a condition of employment" (*id.* 26a); and (d) the MOU "clearly indicates the intent of the Company to take disciplinary action for violation, includes [sic] termination." (*Id.* 29a.) Beyond this, the Arbitrator said nothing about the MOU or Kennecott's claims to discretion under the MOU. Instead, the Arbitrator ignored the terms of the MOU he earlier recognized, and, relying on his own opinions as to the appropriate use of drug tests, imposed his own requirement that Kennecott could *discipline* an employee only for on-the-job drug use. (Pet. at 22.) The Award fails to draw its essence from the CBA and MOU, and the Tenth Circuit failed to follow the relevant rulings of this Court in enforcing the Award.

CONCLUSION

For the reasons stated above, Petitioner Kennecott Utah Copper Corporation respectfully requests that the Court grant its Petition for a Writ of Certiorari and coordinate the further processing of this case with that of *Eastern Associated*.

Respectfully submitted,

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